have lost any right except to prove in the bankruptcy as ordinary creditors. I might add that on principle I should not feel disposed to give the Commissioners a priority for debts incurred by them in their capacity as a trading concern and in the absence of clear statutory provision, I think that this claim must fail.

I would dismiss the appeal and direct the appellants to pay the costs of the Official Assignee and the supporting creditors.

Appeal dismissed.

Solicitors for the Appellants—*Drew & Napier.*

The Official Assignee—*Respondent.*

Solicitors for the opposing Creditor—

Donaldson & Burkinshaw.

[APPELLATE CIVIL JURISDICTION]

THE STRAITS STEAMSHIP CO., LTD.

Plaintiffs (Respondents)

vs.

Lieut. J. H. OWEN, D.S.O., R.N.R.

Defendant (Appellant)

[PENANG CIVIL APPEAL No. 6 of 1932]

Shipping—sanction to prosecute—Harbour Master's discretion—refusal to exercise—mandamus—Crown's servants—whether compellable—Ss. 14, 17 & 444, Ordinance No. 125 (Merchant Shipping).

By section 14 of the Merchant Shipping Ordinance every foreign going steamship is required by law to be provided with officers properly certificated in accordance with the scale therein mentioned. A motor schooner "Kim Kean Aun" plying between the Burmese and the Colony ports arrived in Penang on the 29th February, 1932, defectively manned and the Plaintiffs desired to prefer a charge against its owner under section 17 of the Ordinance. Before they could do so, they would have to obtain sanction from the Harbour Master, the defendant in this case. An application was duly made to that officer for the necessary sanction but this was refused as a result of instructions received by him from the Colonial Secretary.

Held by the Court of Appeal (Murison, C.J.; Thorne, Ag. C.J., and Terrell, J.) that a mandamus could properly issue to the Harbour Master to exercise his discretion in granting or refusing sanction to prosecute.

The Court in the exercise of its prerogative jurisdiction to grant or refuse a mandamus cannot do so against the Crown, or against an executive officer of the Crown charged with the performance of statutory duties owed to the public. The Court, however, can and will order a writ of Mandamus to issue to compel the performance of duties in the performance or non-performance of which some section or member of the public, in this case the plaintiffs, is especially interested.

The statutory power vested in the Harbour Master imposes upon him a duty to the public, in the performance of which duty he is bound to exercise his discretion.

APPEAL from an order *nisi* of Whitley, J., for a prerogative Writ of Mandamus to be issued commanding the Harbour Master of Penang to grant a sanction to the plaintiffs to prefer a charge against the owner of the motor vessel "Kim Kean Aun" under Section 14 of Ordinance No. 125 (Merchant Shipping).

The facts and arguments are related in the Judgment of Murison, C.J., below.

Mills, Acting Attorney-General, for the Appellant.

Hume, for the Respondent.

Cur. Ad. Vult.

MURISON, C.J.—This is an appeal against an order of Whitley, J.

The proceedings were first commenced by an action (Suit No. 97 of 1932, Penang) wherein the Plaintiffs-Respondents (hereinafter referred to as the Company) issued a writ dated the 16th March, 1932, for a mandamus commanding the Defendant-Appellant (hereinafter referred to as the Harbour Master) to grant a sanction to the Company to prefer a charge against one Ng Kin Yin the master of the motor-schooner "Kim Kean Aun" under section 14 of Ordinance No. 125 (Merchant Shipping) for an offence punishable under section 17 of the said Ordinance.

When the case came on for hearing Mr. Gibson, for the Harbour Master, objected that the procedure should be by application for a prerogative writ of mandamus. The trial judge agreed and the action appears to have been discontinued.

Then upon the 31st March, 1932 the Company took out an originating motion (No. 4 of 1932, Penang) moving that the Harbour Master be ordered to show cause why a prerogative writ of mandamus should not be issued commanding him to grant a sanction to the Company to prefer the same charge as is set out above.

Upon this motion Whitley, J., granted an order *nisi* which came on for hearing on the 8th April, 1932.

The facts in the main are not in dispute nor is there any dispute as to the sections of the Ordinance No. 125 (Merchant Shipping) applicable. Both can be stated shortly.

The Company's ships and the motor-schooner ply in competition between the Burmese and Colony ports. The Company and the owner of the motor-schooner are both subject to the Ordinance. Section 14 requires that such ships shall be provided with officers duly certificated according to a specified scale. At all times material to these proceedings the Company's ships complied with these requirements and the motor-schooner did not. In these circumstances the Company's contention is that the motor-schooner constitutes a danger to their ships and can compete on an unfair basis with their ships.

Section 17 (2) of the Ordinance provides as follows:—

> "If any ship proceeds to sea from or plies at any Settlement, or attempts to proceed or ply, without the complement of officers required by this Ordinance, the owner and master thereof shall be liable to a fine not exceeding five hundred dollars and the ship may be detained until it is provided with such complement of officers duly certificated under this Ordinance."

Now, it appears that in 1927 a ship similar to the motor-schooner was detained by the Harbour Master under this subsection 17 (2). Upon representation by the Indian Government the Government of the Colony purported to exempt (by what authority, I do not know) these offending ships from the operation of sections 14 and 17, but on the 27th November, 1931, the exemption was withdrawn and notice given that section 14 would be universally enforced as from 1st January, 1932.

On the 29th February, 1932, the motor-schooner in this case arrived in Penang defectively equipped and the Company desired to set the law in motion against its owner.

Section 444 of the Ordinance is as follows:—

> "No person shall be charged with any offence under this Ordinance, other than an offence relating to discipline or order on board a ship, except on the complaint or with the sanction of a Port Officer, a Port Health Officer, a Surveyor of Ships or a police officer."

The Company, therefore, on the 2nd March, 1932, wrote to the Harbour Master asking for his sanction to their prosecution of the owner of the motor-schooner for an infringement of section 14.

At this point there is some difference as to the facts. Mr. Hume, for the Company, spoke on the telephone on the 2nd March to the Harbour Master. It is agreed that the latter conceded that the motor-schooner, and similar defectively equipped vessels, were a danger to navigation. But then Mr. Hume says, and the Harbour Master denies, that he, the Harbour Master added that he had found a letter in his file from the Colonial Secretary instructing him not to take proceedings against these motor-vessels. Again, in his affidavit of 31st March, 1932, Mr. Penrice (manager of Mansfield & Company, the Company's agents in Penang) says (paragraph 12) that Mr. Hume told him that the Harbour Master again spoke to him (Mr. Hume) on the 3rd March and said he had been instructed not to issue a sanction. And then on the same day (3rd March) the Harbour Master wrote to the Company's Solicitors a letter the material part of which is as follows:—

> "I have the honour to reply to your RDH:S of 2nd March, 1932, with reference to your request to prefer a charge against the Master of this vessel, which I am directed to refuse.
>
> "2. I also beg to inform you that the position has been laid before Government afresh by telegram and a report of the circumstances will be sent later."

Again, in his affidavit of the 7th April, 1932, the Harbour Master, after denying (paragraph 6) that he had said on the telephone to Mr. Hume that he could not act because of the Colonial Secretary's instructions, says (paragraph 7):—

> "I consulted the Executive officers of the Crown and was instructed that for political reasons the contemplated prosecution was not in the public interest."

and then (paragraph 7) he adds:—

> "On a knowledge of the facts to which I have referred in paragraph 7, I exercised my discretion to refuse sanction."

And so, in the end, the Harbour Master refused to give his sanction and this concludes the statement of the facts.

A writ of mandamus, says Blackstone (Commentaries III, 109) is, in general, a command issued in the King's name from the Court of the King's Bench, and directed to any person, corporation, or inferior Court of judicature within the King's dominions requiring them to do some particular thing therein specified which appertains to their office or duty.

The definition is, as stated, general and there are particular cases where the writ will not issue. One of these particular cases is that concerning a servant of the Crown.

The Acting Attorney-General first argues that the Harbour Master is a servant of the Crown and that therefore this mandamus cannot issue. He quotes *R.* v. *Income Tax Commissioners*, (1920) 1 K.B. 26. But this proposition is itself of a divisible nature. It is true in some circumstances and not in others. It is true if the servant of the Crown is acting under a statutory power which imposes merely a duty to the Crown. It is not true if he is acting under a statutory power which imposes upon him a duty to the public. We have, therefore, to seek the tests laid down for the assignment of any particular case to either of the two categories.

The difference between the two classes of cases is clearly indicated in several cases. Thus Lord Esher M.R. in *R.* v. *Commissioners, etc.*, (1888) 21 Q.B.D. 317, says:—

> "With regard to the question whether mandamus will lie, I am of opinion that the

case falls within the class of cases where officials, having a public duty to perform, and having refused to perform it, mandamus will issue upon the application of a person interested to compel them to do so."

Commenting on this case Lord Reading, C.J., in *Rex* v. *Commissioners for Special Purposes of Income Tax*, (1920) 1 K.B. at page 38 says:—

"It is true that we, sitting here in the King's Court, and issuing orders commanding persons to carry out duties in the name of the Crown, cannot order the Crown to carry out a duty, yet we can order persons who are charged with statutory obligations to carry out those obligations if they fail to do so, provided they come within the terms of the proposition laid down by Lord Esher. It has been said by this Court on more than one occasion that the Court cannot issue a mandamus directed to the Crown or to a person simply acting in his capacity of servant of the Crown. Cockburn, C.J., in *Reg.* v. *Lords, Commissioners of the Treasury*, said:—With reference to that 'jurisdiction,'—namely, the jurisdiction with regard to the issue of a mandamus directed to the Crown or to a person simply acting in his capacity of a servant of the Crown—we must start with this unquestionable principle, that when a duty has to be performed (if I may use that expression) by the Crown, this Court cannot claim even in appearance to have any power to command the Crown; the thing is out of the question. Over the Sovereign we can have no power. In like manner where the parties are acting as servants of the Crown, and are amenable to the Crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction."

The line of demarcation is, therefore, reasonably clear. Has the Harbour Master a duty to the public? or only to the Crown? What one has to look at is the whole subject-matter of the case, the position and character of the person empowered, the general objects of the statute and above all, the position and rights of the persons for whose benefit the power is conferred, *Julius* v. *Bishop of Oxford*, (1880) 5 A.C. at page 232. It seems to me impossible to contemplate the scope of the Ordinance (that is Merchant Shipping) and the duties of the Harbour Master without coming to the conclusion that there is a duty to the public. He controls fires on board a ship in port (section 423), he licenses junks and tongkangs (section 424) orders the removal of vessels sunk on the foreshore (section 416) or of floating timbers or rafts (section 411) or of ballast or rubbish (section 414) and of any obstruction to navigation (section 410), or of any unauthorised buoys; he approves the marking of ships (section 404); he has the sole power of giving port clearance (section 399) and in short has a large number of duties controlling, for the benefit of the public, the conduct of ships and things which appertain to navigation. And to nearly all of these provisions penalties for breach of them are attached and so require the Harbour Master's sanction under section 444 before a prosecution can follow. And then, with regard to the Company it is clear that as a rival shipping concern they are particularly interested and, in fact, have a right in the observation by other shipping concerns of the rules laid down for the safety of ships in navigation.

Cases of the other of the two classes to which I have referred are of a much narrower nature. As an example of these *The Queen* v. *Commissioners of Lunacy*, (1897) 1 Q.B. 630 is quoted though the case seems to me to be one upon discretion rather than the power to issue a mandamus. *Julius* v. *Bishop of Oxford*, (1879) 5 A.C. 214 is a better example.

For these reasons I am of opinion that a mandamus can properly issue to the Harbour Master in this case.

It is conceded and is clear, that if there is a statutory duty imposed on the Harbour Master he has a discretion which he is bound to exercise.

It is next argued that he did in fact exercise such discretion. I have set out above the facts commencing with the telephone conversation between Mr. Hume and the Harbour Master and ending with the latter's refusal to grant the sanction. The question is whether the Harbour Master did exercise his discretion or not. The test in cases of this kind is clearly stated by Cockburn, C.J., in *The Queen* v. *Adamson*—"I cannot resist the conclusion that the magistrates must have acted upon a consideration of something extraneous and extra-judicial which ought not to have affected their decision and which it seems to me was the same as declining jurisdiction."

They had not, he adds, exercised their discretion upon the facts presented to them.

Whitley, J., found upon the evidence before him that the Harbour Master had, upon his own statement of the facts, acted not on his own discretion, but upon the instructions of some other executive officers. "I was instructed" he says "that for political reasons the contemplated prosecution was not in the public interest." It is idle for him to say after that that he

exercised his discretion accordingly. Action on instructions from another is the direct negation of the exercise of a personal discretion. Nor does the contention that by section 9 (2) of the Ordinance the Harbour Master has to follow the instructions of the Master Attendant cover the clear fact that instructions came to him from executive officers other than the Master Attendant.

I agree, therefore, with the finding of Whitley, J., that the Harbour Master in this case did not exercise his discretion in refusing the sanction for which the Company asked.

The next point is whether or not the Company has a sufficielt interest to support their application; for mandamus issues only in cases where, as Blackstone says III, 110, "the party hath a right to have anything done." The extent of this right is not very clear. "The general question" said Lord Alverstone in *R.* v. *Manchester Corporation,* (1911) 1 K.B. at page 563 "as to the amount of interest which will entitle a person to apply for a mandamus is one which in a future case will require further consideration." We are still, so far as I know, waiting for that case. At present it is decided in *The Queen* v. *Cotham,* (1898) 1 Q.B. at page 804 that a resident in a particular area had a sufficient specific interest in the grant or refusal of a licence by the licensing justices to support an application for a mandamus to the justices. In *R.* v. *Manchester Corporation* cited above, it was held that the prosecutors who had sought to enforce a clause in an Act which was accepted in committee on their own petition, had a sufficient interest though they were not named in the clause.

Here the Acting Attorney-General says the Company are no better than common informers. I cannot accept that view. The present applicants are in my opinion in a much stronger position than the applicants in either of the two cases cited above. They are, as I have said in another connection, rival traders plying in the same waters and whether one looks at the danger to navigation caused by the defective equipment of these motor vessels, or at the advantage such defective equipment gives on overhead charges it is, I think, undeniable that the Company's special interest is definitely established.

One point remains. It is laid down that mandamus does not issue where a remedy is obtainable by some other process (*R.* v. *Archbishop of Canterbury,* (1812) 15 East at page 136) or at least has only a "more tedious" remedy (Blackstone, III, 110 and the cases cited in Short and Mellor, 2nd edition, page 210). No argument was addressed to us on this point; nor was it suggested that any other remedy was open to the Company than process by mandamus.

For these reasons I agree with the learned trial judge that the mandamus should issue. But I am not sure that the terms of the order made by the trial judge are right. The order, made on the 11th April, was that the Rule *Nisi* made on the 4th April, 1932, ordering the Harbour Master "to show cause why a prerogative writ of mandamus should not be issued against him commanding him.....to grant a sanction to the said Company etc." be made absolute. In my opinion the order should be that the writ should issue to the Harbour Master in terms commanding him, not to grant a sanction, but to exercise his discretion in regard to the grant of a sanction upon the Company's application.

I would, therefore, vary the form of the order, but subject to this detail I would dismiss the appeal with costs.

THORNE, AG. C.J.—This appeal was heard at the Penang Court of Appeal on Friday the 12th August, when, although the members of the Court were agreed, it was arranged that we should write reasons for judgment.

I have since had the great advantage of reading the judgment of the learned Chief Justice with whose statement of the facts, and conclusions upon the law applicable in this case, I respectfully concur. It would appear clear that the Court in the exercise of its prerogative jurisdiction to grant or refuse a mandamus cannot do so against the Crown, or against an executive officer of the Crown charged with the performance of statutory duties. But the Court can and will, in a proper case, order a writ of mandamus to issue to compel the performance of duties in the performance or non-performance of which some section or member of the public is especially interested.

The question then arises whether upon the true construction of the provisions of section 444 of Ordinance No. 125 (Merchant Shipping), the Port Officer is charged with the performance of a statutory duty owed to the public, or any member, or section of the public, or whether he is charged only with the performance of an executive duty owed by him to the Crown and to no one else.

I first entertained some doubt as to the true interpretation of this section, which reads as follows:—

> "No person shall be charged with any offence under this Ordinance, other than an offence relating to discipline or order on board a ship, except on the complaint or with the sanction of a Port Officer, a Port Health Officer, a Surveyor of Ships, or a Police Officer."

It is to be observed that the section prohibits any person being charged with an offence under this Ordinance except upon the complaint or with the sanction of the four officers or classes of

officers enumerated in the Section. The Port Officer may, if he deem fit, lay a complaint before a Magistrate, or he may sanction a prosecution. In regard to the former it may well be contended that the Port Officer owes a duty to the Crown and to no one else, and it was argued by the learned Acting Attorney-General that the position was the same with regard to the granting or refusing of a sanction to institute a prosecution. In regard to the former the Port Officer has undoubtedly a statutory power to lay a complaint, and whether or not this power carries with it a duty to the public does not arise on this appeal, and I desire to carefully avoid the expression of any opinion.

As to the latter, the Port Officer clearly has a statutory power to sanction a prosecution, and, I am of the opinion, that this power involves a statutory duty to the public, or to a section of members of the public, to perform that duty. It may well be that, in the performance of many of his duties under the provisions of this Ordinance, the Port Officer is an executive officer of the Crown against whom a writ of mandamus will not be ordered. But I am of the opinion that in the performance of his duty in considering whether or not he should grant or refuse a sanction to prosecute under this section, the Port Officer is called upon to exercise a discretion of a quasi-judicial character, and, in the exercise of that discretion, he is not performing the functions of an executive officer of the Crown, but is performing a statutory duty owed to both the Crown and to the public.

I am of the opinion that the respondents to this appeal are peculiarly interested in the proper exercise by the Port Officer of his discretion to grant or refuse a sanction to prosecute in the facts of this case, and that they have therefore a *locus standi* to come to the Court and ask for the relief which they sought in this case.

The Attorney-General sought to establish that in fact the appellant did exercise his discretion. In this, in my humble opinion, learned counsel is not supported by the evidence of the appellant himself. It seems to me that the last-named was quite frank in the statement he made in paragraph 7 of his affidavit of the 7th of April, 1932, where he states:

> "I consulted the executive officers of the Crown and was *instructed* that for political reasons the contemplated prosecution was not in the public interest."

It seems to me that this deponent makes it quite clear in this and the preceding paragraph of his affidavit that, although he realised he had a discretion to grant or refuse a sanction, he in fact refused a sanction upon the instructions of the executive officers of the Crown. Obedience to instructions, in my view, is the very antithesis of the exercise of a discretion and, in my view, the learned trial Judge below was right in his ruling that the appellant had not exercised and indeed did not claim to have exercised a discretion in this matter.

The only remaining question to be considered is the terms of the order made by the learned Judge. The order of the 11th day of April, 1932, directs that the rule *nisi* be made absolute. In my humble opinion this order was inaccurate because the effect is to order the appellant to grant the sanction.

The complaint of the respondents was that the appellant had failed to exercise his discretion and, in my view, the order made should have been directed to the Harbour Master commanding him in terms to exercise his discretion to grant or refuse a sanction to the respondents.

In my view subject to this variation of the order of the 11th day of April, 1932, this appeal should be dismissed with costs.

TERRELL, J.—In this case I have had the opportunity of reading the judgment of the learned Chief Justice and it is therefore unnecessary for me to repeat his findings of fact with which I respectfully agree.

I concur, therefore, with his conclusion and with that of the learned trial judge that the appellant, the Harbour Master of Penang, did not exercise his discretion in refusing the sanction for which the Company asked.

Proceeding from that finding the following questions arise:—

(1) what is the nature of the prerogative writ of mandamus?
(2) will it lie against a servant of the Crown?
(3) upon the construction of Section 444 of Ordinance No. 125 (Merchant Shipping) had the appellant merely a power to grant a sanction or was he under any particular duty to grant a sanction?
(4) if he had a duty, was his duty merely to the Crown or did he also have a duty to the public? and
(5) have the Straits Steamship Company a special interest enabling them to apply for a writ of mandamus?

A writ of mandamus is a high prerogative writ whereby the Court in the King's name commands the person to whom it is addressed to perform some public or quasi-public legal duty which he has refused to perform and the performance of which cannot be enforced by any other adequate legal remedy.

The usual form of the writ, which is given on page 518 of the second edition of Short and Mellor—The Practice of the Crown Office, indicates clearly what conditions must be present and what

requirements must be observed before the writ will issue.

The writ in the present case follows the usual form and commences as follows:—

> "GEORGE THE FIFTH, By the Grace of God, of Great Britain, Ireland, and the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India, to Lieut. J. H. Owen of the Harbour Master's Office, Penang, the Port Officer of the Port of Penang, Greeting."

After some preliminary recitals the writ proceeds:

> "WHEREAS we have been given to understand and are informed in the Supreme Court of the Straits Settlements, Settlement of Penang, before us that on or about the 3rd day of March, 1932, you were required on behalf of the Straits Steamship Company, Limited, to grant a sanction to them to prefer a charge against the said Ng Kim Yin in respect of the said offence committed by him, but that you the said J. H. Owen well knowing the premises, arbitrarily illegally and without *bona fide* exercising your discretion therein and not regarding your duty in that behalf then and there wholly neglected or refused to grant the sanction required of you as aforesaid, nor have you at any time since granted such sanction as aforesaid being influenced thereby wholly by circumstances extraneous to your duties as the Port Officer of Penang, in contempt of us and to the great damage and grievance of the Straits Steamship Company, Limited, as we have been informed from their complaint made to us. Whereupon we, being willing that due and speedy justice should be done in the premises as it is reasonable, do command you that you, as the Port Officer of Penang, **do grant a sanction to the said The Straits Steamship Company Limited to prefer a charge against the said Ng Kim Yin in respect of the offence aforesaid committed by him,** or that you show us cause to the contrary thereof, lest by your default the same complaint should be repeated to us, and how you shall have executed this our Writ make known to us in our said Court at Penang, forthwith then returning to us this our said Writ, and this you are not to omit."

The words in bold type are not, of course, taken from the original form and whether the form of the actual command is the command proper to the circumstances of the present case will be considered later.

The form of the writ itself is a guide to its extent and to its limitations. As it is an order in the name of the King it does not issue to any superior Court which exercises jurisdiction in the name of the King, nor will it lie to the Crown or officers of the Crown acting as such.

But this does not mean that every subordinate official is entitled to complete immunity from a writ of mandamus if he does not perform his duties, and it was admitted by the learned acting Attorney-General that the writ would lie against an official charged with a statutory duty which he had failed to perform.

On this principle a writ of mandamus was granted against the Commissioners of Income Tax to compel them to issue certain orders for repayment. In *Regina* v. *Commissioners for Special Purposes of the Income Tax*, 21 Q.B.D. page 317. Lord Esher M.R. at page 317 states:—

> "With regard to the question whether mandamus will lie I am of opinion that the case falls within the class of cases where officials having a public duty to perform and having refused to perform it mandamus will lie on the application of a person interested to compel them to do so."

This *dictum* of Lord Esher M.R. was cited with approval in the case of *Rex* v. *Commissioners for Special Purposes of the Income Tax: Ex parte Dr. Barnardo's Home:* 1920, 1 K.B. page 26, where a mandamus was directed to the Commissioners at the instance of Dr. Barnardo's Home. It was held that although the Commissioners were in a sense servants of the Crown they also had a duty to the public. As Darling, J., says, on page 46:—

> "In this case according to the decision which I have cited (*Regina* v. *Secretary of State for War*, 1891, 2 Q.B. page 326), it seems to me it is clear that these Special Commissioners are not merely acting as servants of the Crown. It may be that they are answerable to the Crown but they are also answerable to the subject who is entitled to exemption."

These cases therefore indicate the nature of the writ of mandamus and the circumstances under which such a writ will issue against a servant of the Crown. The position is summarised in Short and Mellor at page 202 as follows:—

> "The general principle running through all of them (the cases cited) is that where in the absence of any equally appropriate remedy a statutory duty is cast upon servants of the Crown to do some ministerial act necessary to enable a claimant to make good his claim to relief, mandamus will issue; but it must clearly appear that the statute imposing the obligation does create a duty to the applicant."

It is now necessary to consider the actual scope of Section 444 of the Ordinance under which the sanction was asked for and refused. The Section reads as follows:—

> "No person shall be charged with any offence under this Ordinance, other than an offence relating to discipline or order on board a ship, except on the complaint or with the sanction of a Port Officer, a Port Health Officer, a Surveyor of Ships or a Police Officer."

It was argued by the appellant that the section as worded merely gave the Harbour Master a power to give or refuse his sanction, that he may have owed a duty to the Crown, but that he owed no duty to the public in general and to the applicants in particular. To arrive at the meaning or intention of the section it is necessary to consider shortly the objects of the Ordinance. There can, I think, be no doubt that the object of the Ordinance is to control and regulate shipping in the various ports of the Colony, and that the Harbour Master is entrusted with the duty of carrying the provisions of the Ordinance into effect. One of his duties is to exercise a discretion in granting or withholding a sanction under Section 444.

It was, however, strongly argued by the appellant that the discretion, if any, vested in the Harbour Master need not be exercised on strictly legal grounds but can be exercised on political grounds also, and he cited the power of the Secretary of State in England to exempt vessels from the operation of the Territorial Waters Act, his discretion in that case being exercised on political grounds and not being subject to review by any Court. Now I quite agree that a statute can be so framed as to give the Executive an over-riding power to exempt any classes of persons or things or any particular person or thing from the operation of the statute. It is not for the Courts but for the Legislature to say whether it is desirable that such arbitrary powers be vested in the Executive. All that the Courts can decide is whether under any particular statute such arbitrary powers have in fact been vested in the Executive or not. A cursory perusal of Ordinance No. 125 (Merchant Shipping) will indicate that in several highly important matters power is reserved to the Governor-in-Council to abrogate the Ordinance in favour of particular ships or classes of ships. For instance, Section 399 (1) provides that no ship unless exempted under sub-section (2) shall leave any port without a port clearance. Section 399 (2) (a) provides that sub-section (1) shall not apply to any ship of war, troopship or other ship belonging to or for the time being in the service of His Majesty. Sub-section (b) provides a further exemption in the case of "ships of a class which has been exempted from the operation of this section by the Governor-in-Council." Then again Section 442 (2) provides:

> "The Governor in Council may declare that any of the provisions of this Part (Part XI) shall not apply to the ships of any foreign prince or state."

It will be noticed that there is no indication of the grounds upon which the Governor in Council may exercise his discretion to exempt and it may well be therefore that such discretion may be exercised, and in fact that it was intended that such discretion should be exercised, on purely political grounds. It is equally important to notice that where the Legislature has granted the Governor in Council so arbitrary a discretion it has done so in unequivocal words.

It is important to bear this in mind considering the construction which the acting Attorney-General has sought to put upon Section 444. It is not disputed that the motor vessel "Kim Kean Aun" had not complied with Section 14 of the Ordinance and that the vessel was liable to be proceeded against. No prosecution, however, could be undertaken except at the instance or with the sanction of "a Port Officer, a Port Health Officer, a Surveyor of Ships or of a Police Officer." One of these officers, in the present case the Port Officer, had to decide whether to give such sanction or not. If, as argued by the learned acting Attorney-General, he could so decide according to the directions of the Executive in Singapore the practical result would be to enable the Governor-in-Council to exempt any vessels or classes of vessels from the necessity of complying with Section 14. If this had been the intention of the Legislature it should have said so in clear and unmistakeable words such as are found in Sections 399 (2) (b) and 442 (2) above quoted. *Prima facie* an Ordinance enacting obligations or penalties for their non-performance applies to all persons equally, and in construing the Ordinance the Court should not find that any class of persons can be exempted from its operation unless the Ordinance has so provided in the clearest possible terms, especially when such exemption may be to the detriment of other persons not so exempted. There is, to my mind, nothing in the wording of Section 444 which should lead the Court to conclude that the effect of the Section is similar to that of Section 399 (2) (b) or Section 442 (2). It is to be observed that in 1927 the Governor-in-Council purported to exempt a vessel similar to the "Kim Kean Aun" from the operation of Section 14 by Order in Council, but the fact that this exemption was withdrawn in 1931 may be an indication that the Executive abandoned the idea of claiming a right which was not expressly conferred by the Ordinance.

The conclusion to be drawn therefore is that the discretion vested in the Harbour Master under Section 444 is not an absolute discretion but a discretion which must be exercised on quasi-legal grounds and with the object of carrying the provisions of the Ordinance into effect. The discretion would therefore be properly exercised and a sanction refused if a proposed prosecution was undesirable on technical grounds or because it was frivolous or oppressive.

This interpretation is strengthened by Section 9 (2) of the Ordinance which provides that Harbour Masters shall perform their duties under the direction of the Master Attendant of the Straits Settlements. The Master Attendant, like the Harbour Master, is a technical and not merely an executive officer, and must be expected to give his directions on technical grounds. If it were intended that the Harbour Master should exercise his discretion on political grounds one would have expected a provision that the Harbour Master should perform his duties under the direction of the Colonial Secretary, *i.e.*, of an executive as opposed to a technical officer.

It might possibly have been more satisfactory if the Legislature had thought fit to specify the manner in which the Harbour Master should exercise his discretion instead of leaving it as an inference to be drawn from the Ordinance as a whole, but I have little doubt that in giving the discretion in such wide terms the Legislature placed confidence in the honesty and integrity of a qualified professional officer and relied upon him to enforce the provisions of the Ordinance without fear or favour.

The result, however, of giving the discretion in such wide terms is that the Harbour Master could refuse his sanction without assigning any reason and the Courts might be compelled to presume that in such a case the discretion had been honestly exercised, although in fact it might have been exercised on grounds entirely alien to the intention of the Legislature. Fortunately, in the present case the question does not arise as the Harbour Master did not in fact exercise his discretion at all, having merely obeyed the directions of the Executive.

The next questions that arise are whether the Harbour Master has a duty to exercise his discretion, the terms of Section 444 being merely permissive, and whether such duty is owed to the public generally or merely to the Crown.

Now as stated above, the general object of the Ordinance is to control shipping in the ports of the Colony and all shipowners using such ports have an interest in seeing that the provisions of the Ordinance are carried into effect.

I conclude, therefore, that the power of granting or withholding a sanction is vested with the Harbour Master for the purpose of being used for the benefit of persons having rights in the matter, and I agree with the learned Chief Justice that he owed a duty to the public as well as to the Crown. From this it follows that although the authority given by Section 444 is in form permissive, it is imperative for the Harbour Master to exercise his discretion as to whether he should grant his sanction or not. (*See* Maxwell on Interpretation of Statutes, 6th Ed., page 436 and following pages). An analogous case is that of an information brought before a magistrate. The magistrate certainly cannot be compelled to issue a summons or warrant, which he may grant or refuse at his discretion. But he cannot refuse to consider the information at all. In other words, he can be compelled by mandamus to exercise his discretion, though, of course, such discretion must be exercised on legal grounds. In an extreme case where it has been established that magistrates have acted upon a consideration of something extraneous and extra-judicial which ought not to have affected their decision, the matter is treated in the same way as if they had declined to exercise their discretion, see *Regina* v. *Adamson*, 1 Q.B.D. page 201. At page 205, Cockburn, C.J., states:—

> "If they had issued summons and heard the evidence upon oath and had determined that it was not trustworthy, the matter would have been one of which they would have been the sole judges, but I cannot but think that what they did was not merely to consider whether or not the witnesses were worthy of belief. I think it very probable that they thought they were doing what was right and that they were influenced by their distaste for the views and doctrines promulgated at the meeting, and thought that the sooner the matter was buried in oblivion the better. But these were considerations which ought not to have influenced them at all and I think they must be taken to have declined jurisdiction."

I think also that the applicants have a special interest as shipowners using the port quite apart from the fact that the "Kim Kean Aun" was competing with them in business and I have nothing to add to the observations of the learned Chief Justice on this point. I think, therefore, that they were entitled to set the machinery in motion with a view to the motor vessel "Kim Kean Aun" being proceeded against.

The granting of a writ of mandamus is always discretionary and the writ will not be issued if there is any other specific and efficient remedy available. Thus a writ of mandamus will not issue against a subordinate officer if by bringing

the matter to the notice of his superior officers he can be prevailed upon to perform a statutory duty. But I agree with the learned trial judge that in the circumstances of the case no other remedy was open to the applicants. This decision is in accordance with the rule suggested in Short and Mellor, at page 205, which reads as follows:—

> "When a subordinate has a statutory duty cast upon him to the public at large mandamus will lie against him at the suit of one of the public, especially if he is supported and upheld by his masters."

For the above reasons I am of opinion that all the conditions necessary for the granting of a writ of mandamus were present, and that the discretion of the Court was properly exercised in favour of the applicants.

As to the form of the Rule Absolute, the Court is not asked to find that the Harbour Master has exercised his discretion on the wrong grounds, as in the present case he has not exercised his discretion at all. I agree therefore with the variation in the final order suggested by the learned Chief Justice.

I would dismiss the appeal with costs.

Appeal dismissed.

Solicitors for the Respondents—*Adams & Allan.*

[APPELLATE CIVIL JURISDICTION]

LYE BOON HONG & ANOR.....Plaintiffs (Appellants)

vs.

ISHIHARA SANGYO KAIUN GOSHI KAISHA.....Defendants (Respondents)

[JOHORE CIVIL APPEAL No. 7 OF 1932]

[BATU PAHAT CIVIL SUIT No. 1 OF 1932]

Practice—Memorandum of Appeal—objections in point of law or of fact to be specifically raised—rejection of appeal.

Unless the grounds of objection to the decision appealed against specify the points of law or fact alleged to have been wrongly decided, the appeal may be rejected or adjourned till the next sitting and the appellant will be ordered to pay costs of the appeal or of the day.

MOTION for the rejection of the Memorandum of Appeal filed by the Appellants in this case and for the dismissal of the appeal on the ground *inter alia* that the grounds of objection to the decision appealed from were not stated with particularity in the Memorandum of Appeal.

The reasons set forth were as follows:—

1. The learned Judge was wrong in law.
2. The facts do not support the finding of the learned Judge.
2. Such findings of facts as were found by the learned Judge were based on erroneous deductions from the evidence before the Court.
4. The judgment was against the weight of evidence.

The motion came on for hearing before Murison, C.J., and Terrell, J.

Spenser-Wilkinson, for the Respondents.

M. V. Pillai, for the Appellants.

The Court of Appeal consisting of Murison, C.J. and Terrell, J. after hearing the arguments on both sides, dismissed the motion but allowed the appellants the costs of the motion. The following Memorandum relating to the practice as to the contents of Memoranda of Appeal in future was read by Sir William Murison—

> "We desire to say that the practice prevailing in Singapore as to the contents of memoranda of appeal in civil and criminal cases will in future be enforced in Johore.
>
> "It is as follows:—Where the appellant is represented by Counsel, the memorandum must contain definite particulars of the points of law or fact in regard to which the trial judge is alleged to have erred.
>
> "If these requirements are not complied with the appeal may be rejected or adjourned till the next sitting and the appellant will be ordered to pay the costs of the appeal or the costs of the day as the case may be.
>
> "Where the appellant is not represented by counsel the formal allegation that the trial judge has erred in law and fact or either will be accepted, without the particulars above-mentioned."

Solicitors for the Appellants—*Pillai & Co.*

Solicitors for the Respondents—

Donaldson & Burkinshaw.

[ORIGINAL CIVIL JURISDICTION.]

In the matter of the Will of Chia Yew Siang (also known as Chia Bok Tong) deceased dated the 7th day of May, 1930.

CHIA CHIEW NEO (SPINSTER)

vs.

TAN THIAN CHYE AND ANOTHER.

[SINGAPORE CIVIL SUIT No. 699 OF 1932.]

Will—Trust for sale—Discretion to postpone—share in residuary estate—vested interest in share at 21—right of beneficiary to insist on immediate payment.

By his Will the testator directed his trustees to pay certain monthly allowances for life to various persons and for such purpose to appropriate a fund out of his assets sufficient at the date of the appropriation to answer out of the income thereof the payment of the monthly